(24) (20)

Nos. 91-1111 & 91-1128

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

HARTFORD FIRE INSURANCE CO., *et al.*,
Petitioners,
v.
STATE OF CALIFORNIA, *et al.*,
Respondents.

MERRETT UNDERWRITING AGENCY
MANAGEMENT LIMITED, *et al.*,
Petitioners,
v.
STATE OF CALIFORNIA, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR RESPONDENTS (PRIVATE PARTY PLAINTIFFS)

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QUESTIONS PRESENTED

1. Whether an agreement among certain primary insurers and certain reinsurers to withhold reinsurance from other primary insurers that refused to adopt more limited terms of coverage constitutes "boycott, coercion, or intimidation" under the McCarran-Ferguson Act?

2. Whether an entity, engaged in the insurance business that is subject to state regulation and therefore is immune from liability under the Sherman Act, loses that immunity when it conspires with other insurance entities that are not subject to state regulation to commit acts that violate the Sherman Act?

3. Whether considerations of international comity preclude a federal court from exercising jurisdiction over Sherman Act claims asserted against foreign defendants that engaged in a concerted boycott and other coercive conduct that restrained primary insurers from providing various types of insurance coverage?

PARTIES TO THE PROCEEDINGS

The respondents concur in the statements under this heading in Brief for Petitioners in No. 91-1111, including statements made pursuant to Rule 29.1 of this Court.

This Brief for Respondents is filed on behalf of the following private party plaintiffs in the district court proceedings, who were appellants in the Ninth Circuit: Ace Check Cashing, Inc.; Acme Corrugated Box Co.; Anastasios Markos, t/a Municipal Exxon; Bay Harbor Park Homeowner's Association; Bensalem Township Authority; Big D Building Supply Corp.; Carlisle Day Care Center, Inc.; Durawood, Inc.; Environmental Aviation Sciences, Inc.; Jerry Grant Chemical Associates, Inc.; Keyboard Communications, Inc.; Carmella M. "Boots" Liberto t/a R.J. Liberto, Inc.; P & J Casting Corp.; and Henry J. Rosenfeld.

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BRIEF FOR RESPONDENTS (PRIVATE PARTY PLAINTIFFS)

OPINIONS

The opinion of the District Court for the Northern District of California is reported as *In re Insurance Antitrust Litigation*, 723 F. Supp. 464 (N.D. Cal. 1989), and is reproduced at pages 33a to 88a in the Petition for a Writ of Certiorari in *Hartford Fire Insurance Co. v. California*, No. 91-1111, and at pages A-32 to A-82 in the Petition for a Writ of Certiorari in *Merrett Underwriting Agency Management Ltd.*, No. 91-1128. References to this opinion in this brief are to the *Federal Supplement* and the *Merrett Underwriting* Petition.

The opinion of the Court of Appeals for the Ninth Circuit is reported as *In re Insurance Antitrust Litigation*, 938 F.2d 919 (9th Cir. 1991), and is reproduced at pages 1a to 32a of the *Hartford* Petition and at pages A-1 to A-31 of the *Merrett Underwriting* Petition. References to this opinion in this brief are to the *Federal Reporter* and to the *Merrett Underwriting* Petition.

The respondents otherwise concur in the statements under this heading in Brief for Petitioners in No. 91-1111.

JURISDICTION

The respondents concur in the statements under this heading in Brief for Petitioners in No. 91-1111.

STATUTORY PROVISIONS

The relevant statutory provisions are as follows, with the pertinent text set forth in the margin: section 1 of the Sherman Act,[1] section 2 of the Sherman Act,[2] section

[1] 15 U.S.C. § 1, which provides in pertinent part, "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ."

[2] 15 U.S.C. § 2, which provides in pertinent part, "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the

2(b) of the McCarran-Ferguson Act,[3] and section 3(b) of the McCarran-Ferguson Act.[4]

STATEMENT OF THE CASE

These cases are before this Court in the pleading stage. In the two cases before this Court, the petitioners were the defendants below and the respondents were the plaintiffs. The district court granted motions to dismiss for failure to state a claim. The court of appeals reversed. Rehearing *en banc* was denied. These complaints "should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

Respondents herein are private parties-plaintiff below.[5] These are private actions alleging violations of section 1 of the Sherman Act and involving commercial general liability ("CGL") insurance. The Statement of Facts is limited to the three issues for which the Court granted *certiorari*:

(a) whether the conduct alleged constitutes a boycott, coercion, or intimidation under section 3(b) of the McCarran-Ferguson Act;

trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . . ."

[3] 15 U.S.C. § 1012(b), which provides in pertinent part, "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, . . . *Provided*, . . . the Act of July 2, 1890, as amended, known as the Sherman Act, . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State law."

[4] 15 U.S.C. § 1013(b), which provides in pertinent part, "Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."

[5] The States' Attorneys General have commenced their suits under the *parens patriae* statute, 15 U.S.C. § 15c(a)(1), on behalf of natural persons. The private plaintiffs, as business entities, have commenced suits as class action on behalf of similarly situated business entities, none of which are within the *parens patriae* statute.

(b) whether domestic insurers forfeit McCarran-Ferguson Act immunity when they conspire with non-state regulated reinsurance companies; and

(c) whether foreign reinsurance companies are subject to the jurisdiction of our federal courts.

Defendants (petitioners herein) are four major primary insurance companies, certain domestic and certain foreign reinsurers, certain domestic and foreign reinsurance brokerage firms, and certain domestic and foreign retrocessional insurance companies. Also named as defendants are two insurance associations—the Reinsurance Association of America ("RAA") and the Insurance Services Office ("ISO").

A. Factual Background and Allegations in the Complaint.

The Complaint[6] alleges that certain primary insurers were dissatisfied with the then existing CGL insurance coverage offered by ISO. These defendants desired to reduce the scope of coverage available. Unable to convince ISO or its membership to adopt their suggestions, these four primary insurers enlisted the aid of both domestic and foreign reinsurers to coerce the ISO membership to accept those restrictions of coverage. The reinsurers then jointly refused to reinsure any CGL coverage other than that demanded by the four primary insurer defendants. As a result, ISO members were forced to capitulate and accept the coverage limitations desired by the four primary insurer defendants. Thus, by enlisting the economic muscle of the reinsurers, of the reinsurance brokers, and of the RAA, the four primary insurer defendants were able to coerce other primary insurers to forgo issuing the coverage other ISO members wanted and to adopt and support the more limited coverage desired by the four primary insurer defendants. This restrained competition and the competitive market that would otherwise

[6] A Complaint used as a representative model by both courts below was the Complaint of the State of California. Thus, all references to the "Complaint" will be to the Complaint of the State of California (Joint Appendix at 5-56) (hereinafter "J.A.").

determine whether the insurance-consuming public preferred primary insurers who offer one kind of coverage to those who chose to offer more limited coverage.

Specifically, the Complaint alleges the following: The four primary insurer defendants—Hartford, Allstate, CIGNA and Aetna—offer CGL coverage throughout the United States. All are members of ISO, a trade association of approximately 1,400 property and casualty insurers in the United States. (Cal. Compl. ¶¶ 38, 47, J.A. 19, 20.) Among other things, ISO develops policy forms providing for terms and conditions of standard CGL coverage and files and processes them with the insurance commissions of the various states in order to gain their approval. (Cal. Compl. ¶¶ 38, 39, J.A. 19.)

In 1977, ISO began to revise its existing CGL policy forms, which provided occurrence coverage.[7] (Cal. Compl. ¶ 20, J.A. 22.) These revisions resulted in two kinds of policies, rather than one, being filed for approval with state insurance commissions. One provided for the traditional occurrence coverage. The other was new and provided claims-made coverage that significantly limited the coverage provided by the occurrence policy.[8]

Hartford opposed ISO's two new policies because of their terms and conditions of coverage on the following grounds: (a) occurrence coverage should be eliminated and replaced by claims-made coverage; (b) claims-made coverage should include a retroactive date provision[9]; (c) pollution coverage should be totally excluded; and (d) payment of defense costs should be limited by

[7] Occurrence coverage covers losses, whenever claimed, that occur during the policy period. (Cal. Compl. ¶ 4(b), J.A. 8.) *See also St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 535 (1978).

[8] Claims-made coverage covers only those losses for which claims are made while the policy is in effect. (Cal. Compl. ¶ 4(c), J.A. 8.) *See also Barry*, 438 U.S. at 535.

[9] A retroactive date provision in claims-made coverage excludes coverage for claims arising out of occurrences prior to the retroactive date. (Cal. Compl. ¶ 4(e), J.A. 8.)

including defense costs within the policy limits. (Cal. Compl. ¶ 61, J.A. 24.) Hartford's opposition was *rejected* by the ISO membership. Accordingly, policies providing for both kinds of coverage, each containing the terms objectionable to Hartford, were filed with state regulators in March of 1984 and thereafter approved in most states.[10]

Unable to convince the ISO membership to adopt the Hartford positions, Hartford and the other primary insurer defendants enlisted the aid of both domestic and foreign reinsurance companies, also defendants herein, to pressure the ISO membership to accept these changes. Primary CGL insurers require that reinsurance be available to them in order to carry on their business. (Cal. Compl. ¶¶ 34, 83, J.A. 18, 29.)

As a direct result of the communications and meetings among the primary insurer defendants and certain domestic reinsurers, the reinsurers announced to the ISO membership and to the public that the reinsurers would not provide reinsurance for coverage provided under the terms and conditions of the 1984 ISO CGL insurance policies. (Cal. Compl. ¶¶ 66-67, J.A. 25.)

The primary insurer defendants also enlisted foreign reinsurers into their quest to have the ISO membership change the 1984 CGL policies because of the types of coverage provided therein. As a result of communications by the primary insurer defendants with Key Lloyd's of London Syndicates (also defendants herein), the latter threatened to refuse to provide CGL reinsurance in the

[10] The following states approved both ISO policies: Alabama, Alaska, Arizona, Connecticut, Florida, Illinois, Louisiana, Maryland, Michigan, Minnesota, Montana, Ohio, Pennsylvania, Washington, West Virginia, and Wisconsin. Massachusetts and New Jersey disapproved the proposed policy changes. New York approved only the occurrence form. California and Colorado do not require the terms of insurance coverage to be approved. *See In re Insurance Antitrust Litig.*, 723 F. Supp. 464, 469 (N.D. Cal. 1989) (Brief for Petitioners No. 91-1128 at A36-37) (hereinafter "A——").

United States unless four demands were met—the same demands that Hartford originally had made to ISO: (a) the elimination of any CGL policy with occurrence coverage; (b) the addition of a retroactive date to claims-made coverage; (c) exclusion of any pollution coverage from any CGL policy; and (d) the inclusion of defense costs within coverage limits. (Cal. Compl. ¶¶ 69-74, J.A. 25-26.) As a result of these threats, the ISO staff reversed its prior position and accepted Hartford's position on retroactive date and pollution exclusions. Thereafter, the primary insurer defendants made an unprecedented demand that representatives of the domestic and foreign reinsurers be invited to address the ISO Executive Committee in New York. (Cal. Compl. ¶¶ 78-82, J.A. 27-29.) At that meeting, the domestic and foreign reinsurers announced that, without changes in the terms and conditions of coverage in CGL policies, they would refuse to reinsure. (Cal. Compl. ¶ 83, J.A. 29.) As a result of the forgoing, the ISO Executive Committee capitulated to most of the demands. It withdrew the 1984 standard policies for CGL coverage and substituted a new standard policy that included almost all of the coverage restrictions insisted upon by the primary insurer defendants and reinsurers. (Cal. Compl. ¶ 84, J.A. 29.)

However, ISO did not do away with occurrence coverage. As part of their conspiracy with the primary insurer defendants, the foreign reinsurers continued to refuse to sell reinsurance for occurrence coverage risks and threatened to revise the reinsurance treaties to include a "Sunset" clause.[11] (Cal. Compl. ¶¶ 87-91, J.A. 30-31.)

[11] A "Sunset" clause in a reinsurance treaty limits the reinsurance coverage of a primary CGL reinsurer on the basis of time. (Cal. Compl. ¶ 4(w), J.A. 11.) Thus, a primary insurer writing occurrence coverage could not obtain reinsurance co-extensive with the scope of the risks it was insuring. This was intended to force primary insurers to stop offering occurrence coverage. (Cal. Compl. ¶ 91, J.A. 31.)

As a result of these pressures from the domestic and foreign reinsurers in compelling ISO to change its terms of claims-made coverage in its policy and to eliminate its occurrence coverage, ISO in fact revised and filed new CGL policies (a revised occurrence policy with new terms and conditions and revised terms and conditions for claims-made coverage). (Cal. Compl. ¶ 98, J.A. 33.) In addition, ISO withdrew all of its support services[12] for the 1973 ISO policy for occurrence coverage (which was still on file as approved in all states). Without these vital ISO support services, it was virtually impossible for any primary insurer to offer occurrence-based CGL coverage. (Cal. Compl. ¶ 99, J.A. 33.)

All of these actions were taken in furtherance of the conspiracy as alleged in the Complaint, to coerce American primary insurers, that were unwilling to do so voluntarily, to acquiesce to the demands of the primary insurer defendants and to stop offering certain terms and conditions of CGL coverage in the American primary insurance market. Consequently, primary CGL insurers were restrained from competing against Hartford, CIGNA, Allstate and/or Aetna by being unable to offer the insuring public occurrence, pollution, and excess or umbrella coverage or payment of defense costs in addition to liability coverage, as well as being unable to provide terms of claims-made coverage.

B. Decisions of the Courts Below.

1. *The District Court for the Northern District of California.*

In considering whether plaintiffs' allegations fell within the section 3(b) exception to the antitrust immunity under section 2 of the McCarran-Ferguson Act, 15 U.S.C. §§ 1012, 1013(b), the district court found that the alleged conduct involved the business of insurance and was sub-

[12] As part of its services, ISO had collected, aggregated and interpreted data on the 1973 CGL coverage standard relating to loss history, costs, and other insurance performance categories. This information is used to project future loss trends and to calculate rates. (Cal. Compl. ¶¶ 42-44, J.A. 20.)

ject to state regulation. The district court then concluded that "plaintiffs' statement does not allege a boycott. Nor does it (or the Complaints) describe conduct that 'accords with the common understanding of a boycott.'" *In re Insurance Antitrust Litig.*, 723 F. Supp. 464, 475 (N.D. Cal. 1989) (A-49). In reaching its conclusion, the district court relied principally upon this Court's opinion in *St. Paul Fire & Marine Insurance Co. v. Barry*, 438 U.S. 531 (1978). *See Insurance*, 723 F. Supp. at 475-7 (A-49-50).

Specifically, the district court concluded that *Barry* required a complete, not a conditional, boycott. The district court relied upon the language in *Barry* that the defendants "are alleged to have agreed that three out of the four *would not deal on any terms with the policyholders* of the fourth." *Insurance*, 723 F. Supp. at 475-76 (A-49) (quoting *Barry*, 438 U.S. at 552) (emphasis added by district court). Among the authorities relied upon were a series of court of appeals and district court opinions that held that no boycott existed where the refusal to deal was conditioned either on adoption of a rate regulation scheme or upon certain terms.[13] *See id.* at 477 (A-51-52).

The district court found "'two reasons for supposing that the Supreme Court [in *Barry*] did not intend to go [so] far'" as to hold agreements to offer insurance only on specific terms as a boycott under the McCarran-Ferguson Act. *Id.* (A-52) (quoting P. Areeda & H. Hovenkamp, *Antitrust Law*, ¶ 210.2, at 107-09 (Supp. 1988)). First, it felt such a holding is "'inconsistent with the statute'" in that it "'would eviscerate the immunity for horizontal agreements on the business of insurance.'" *Id.* (A-52) (quoting P. Areeda & H. Hovenkamp, *supra*). Second, *Barry* "'did not involve an agreement to adopt similar terms.'" *Id.* A-52 (quoting P. Areeda & H. Hovenkamp, *supra*).

The district court found that "plaintiffs here charge no more than an agreement to restrict coverage." *Id.* at 476 (A-50). It distinguished the finding of a boycott in *Barry* in the following way:

> The decision in *Barry*, however, turned not on the pressure and compulsion directed at policy holders [sic] to submit to curtailed coverage, but on the agreement with competitors not to deal with those policy holders [sic] on any terms.

Id. (A-50).

The district court found that the McCarran-Ferguson Act protected the primary insurer defendants from the risk of antitrust liability in the collective process of developing coverage. *See id.* at 478 (A-54). The court believed that the use by some of economic pressures to bring about agreement in the collective development process would not fall outside that immunity. *See id.* (A-54).

> It is also implicit that joint action comprehends efforts to seek agreement by others, including those who might be unwilling to agree were it not for economic exigencies, and again it makes no sense to assert that such efforts constitute non-immune coercion.

Id. at 476 (A-54). The district court viewed the conduct alleged in the Complaint to be nothing more than "horizontal agreements relating to the terms on which the participants were willing to write insurance and reinsurance." *Id.* at 477 (A-52).

Based on its analysis of the allegations of the Complaint, the district court concluded there was no set of facts from which plaintiffs could plead a boycott or coercion. Accordingly, all Complaints were dismissed without leave to amend.[14]

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[13] These opinions are *Meicler v. Aetna Cas. & Sur. Co.*, 506 F.2d 732, 734 (5th Cir. 1975); *UNR Indus., Inc. v. Continental Ins. Co.*, 607 F. Supp. 855, 862-63 (N.D. Ill. 1984); *Grant v. Erie Ins. Exch.*, 542 F. Supp. 457, 464-66 (M.D. Pa. 1982), *aff'd mem.*, 716 F.2d 890 (3d Cir.), *cert. denied*, 464 U.S. 938 (1983).

[14] The district court, in the alternative, also granted summary judgment based upon defendants' submissions outside the pleadings. *See id.* at 491 (A-79). However, those submissions are not relevant to the issues before this Court relating to the McCarran-Ferguson Act.

The district court, in a footnote and without explanation, rejected the argument that the McCarran-Ferguson Act exception is lost as a result of joint action with a non-exempt entity. *See id.* at 474 n.13 (A-46 n.13). It relied upon a similar footnote in *Klamath-Lake Pharmaceutical Ass'n v. Klamath Medical Service Bureau*, 701 F.2d 1276, 1288 n.12 (9th Cir.), *cert. denied*, 464 U.S. 882 (1983).[15] With respect to foreign reinsurers, the district court reasoned that if the dismissal against them were based upon grounds of comity, the issue need not be reached. On the other hand, it reasoned, if comity permits the exercise of jurisdiction, this would be because the American regulatory laws apply to the foreign reinsurers and thus the McCarran-Ferguson Act would apply as well. *See Insurance*, 723 F.2d at 479.

The district court dismissed the claims brought solely against certain London-based defendants (Claims 5, 6 and 8; *Complaint* ¶¶ 131-140; 146-150, JA 43-46; 47-49) for lack of subject matter jurisdiction. The district court found that its jurisdiction over these claims was precluded by international comity. The district court considered the factors in the Ninth Circuit's *Timberlane* test and concluded that factors arguing against jurisdiction, particularly the avoidance of conflict with the laws of other nations, outweighed those favoring jurisdiction here.

2. *The Court of Appeals for the Ninth Circuit.*

As did the district court, the Court of Appeals for the Ninth Circuit found that the claims involved the business of insurance. *See In re Insurance Antitrust Litig.*, 938 F.2d 919, 927 (9th Cir. 1991) (A-18-19). It found that the primary insurers were subject to state regulation. *See id.* at 927-28 (A-19-21). However, it found that

[15] The court of appeals in *Klamath* held this argument to be "frivolous" and reasoned "[w]ere that the case, every insurer with a [non-exempt] provider arrangement (as in *Royal Drug*) or consultive relationship with third parties (as in *Perino*) would forfeit all of its exemption from the antitrust laws." *Klamath*, 701 F.2d at 1288 n.12.

the foreign reinsurers and their contracts were not subject to state regulation and "[c]onsequently, McCarran-Ferguson Act immunity does not attach to the foreign defendants." *Id.* at 928 (A-20). The court of appeals further concluded that the domestic reinsurer defendants, acting in concert with the foreign insurers, lost their immunity under the McCarran-Ferguson Act, since that conduct was not subject to state regulation. *See id.* (A-20-21).

The Ninth Circuit reversed the district court on the issue of whether a boycott, coercion, or intimidation or the threat thereof was alleged in the complaints. It interpreted the allegations of the complaints in an entirely different manner from the district court. Rather than concluding that all that was alleged was a horizontal agreement to fix the terms of coverage, the court found that the complaints alleged a vertical agreement among the primary insurer defendants, the domestic reinsurers and the foreign reinsurers to boycott CGL primary insurers using the ISO forms:

> Led by Hartford, the defendant primary insurers exerted concerted pressure on ISO to get it to withdraw its form for CGL insurance. In June 1984 Hartford persuaded major American reinsurers to agree to boycott the ISO form. Hartford, Aetna, Allstate and CIGNA then joined forces to persuade key underwriters at Lloyd's to agree to boycott the form. The defendants used reinsurance brokers to convey their message. Leading underwriters in London responded to the American request by threatening a boycott of insurance written on the form.

Id. at 923 (A-11); *see also id.* at 930 (A-24). The court agreed that if all that defendants did was agree to the terms on which insurance would be offered, immunity would exist. *See id.* at 928-29 (A-21). But the court of appeals held that the complaint alleged an agreement to boycott non-conforming primary insurers. *See id.* at 930 (A-23-24). In support, it recited the allegations from the complaint on which it relied to reach its conclusion. *See id.* at 929 (A-21-22). The court of appeals posited "[w]hy were the charges of the Complaint not as plain

to the district court as they appear to be on appeal?" *Id.* at 930 (A-24). Unlike the district court, the court of appeals held that when primary insurers are persuaded by "economic exigencies" to agree to certain terms of coverage, and where those "'economic exigencies' are produced by conspirators who refuse to supply reinsurance if the unwilling insurer does not agree, a boycott is in effect and is being implemented." *Id.* at 930 (A-24) (quoting the district court).

The court of appeals did not read *Barry* to require a refusal to deal "on any terms" in order to constitute a boycott. *See id.* at 930 (A-23-24). It recognized that *Barry* involved a boycott directed at policyholders, while the case *sub judice* alleges a boycott against recalcitrant primary insurers. *See id.* (A-23-24). The court reasoned that "[t]he evil fo a boycott is not its absolute character but the use of the economic power of a third party to force the boycott victim to agree to the boycott beneficiary's terms." *Id.* (A-23). The court of appeals equated the combined use of defendants' economic power in *Barry* "to force doctors to accept St. Paul's terms" with the reinsurers' combined use of economic power "to force ISO and its recalcitrant members to accept the terms Hartford and its allies wanted." *Id.* (A-23-24).

The Ninth Circuit reversed the district court's holding that international comity precluded the exercise of its jurisdiction over those claims asserted against the London-based defendants. The Ninth Circuit applied the balancing test it developed in *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976). While it agreed with the district court that assertion of jurisdiction here would "'lead to significant conflict with English law and policy,'" *id.* at 933 (A-29) (quoting the district court),[16] it found that other factors, particularly the direct effects on American markets, outweighed this concern. It held that jurisdiction ought to be asserted by the district court in this case.

[16] Plaintiffs do not agree with this conclusion. *See, infra,* Section III.c.2.

This Court has granted certiorari on only three of the issues decided by the court of appeals:

(a) whether the conduct alleged constitutes a boycott, coercion, or intimidation under section 3(b) of the McCarran-Ferguson Act;

(b) whether domestic insurers forfeit McCarran-Ferguson Act immunity when they conspire with non-state regulated reinsurance companies; and

(c) whether foreign reinsurance companies are subject to the jurisdiction of our federal courts.

SUMMARY OF ARGUMENT

The primary insurer conspirators enlisted the aid of reinsurers who, by jointly agreeing to refuse to reinsure the type of insurance coverage that the conspirators sought to eliminate, coerced recalcitrant primary insurers into eliminating those types of insurance coverage as well. There were boycotts in both the reinsurance and primary insurance markets, both of which are outside the immunity granted by the McCarran-Ferguson Act.

The joint refusal to deal by reinsurers involved the precise boycott condemned in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), the use of a refusal to reinsure in order to coerce participation in a conspiracy by recalcitrant primary insurers.

St. Paul Fire & Marine Insurance Co. v. Barry, 438 U.S. 531 (1978), stressed that the boycott exception to McCarran-Ferguson immunity "is broad and unqualified; it covers 'any' act or agreement amounting to a 'boycott, coercion or intimidation,'" 438 U.S. at 550, and even the dissent expressly recognized that the boycott provision of section 3(b) encompassed "the kinds of antitrust violations alleged in *South-Eastern Underwriters.*" 438 U.S. at 565. The petitioners in *Barry*, several of whom are petitioners in this case, argued that the only circumstance to which the boycott exception applied was to "coercive measures adopted by the conspirators to force other insurance companies and their agents into the conspiracy

or out of the business." Brief for Petitioners in *Barry* at 29. They correctly argued that "[t]he legislative debates show that in enacting the boycott exception Congress was concerned with blacklists and similar punitive measures used by members of an industry to compel other traders to conform their competitive practices to those dictated by the conspiracy . . . ." *Id.* This is the precise circumstance described by Senator O'Mahoney, a member of the Committee that drafted the boycott exception to which the boycott provision of the McCarran-Ferguson Act was to apply. *See* 91 *Cong. Rec.* S1480 (1945). It is the precise situation here.

These agreements on terms and conditions are alleged not to be voluntary among the insurers but rather to be the product of refusals to deal. Since McCarran-Ferguson Act immunity was intended to reach only "cooperative" efforts, *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 221 (1979), agreements reached among insurers as a result of refusals to deal should not fall within the scope of that immunity, particularly where the effect is to restrain competition among the insurers.

Petitioners argue that because their boycott was not absolute, it falls outside section 3(b). However, in their treatise, Areeda and Hovenkamp quote with approval the Ninth Circuit's rejection of this argument: "The evil of a boycott is not its absolute character but the use of economic power of a third party to force the boycott victim to agree to the boycott beneficiary's terms." P. Areeda & H. Hovenkamp, *Antitrust Law* § 210.2 (Supp. 1992). Not only is there no precedent for petitioners' argument, but it runs counter to the many precedents of this Court prohibiting less than absolute boycotts. *See, e.g., South-Eastern Underwriters, supra*; *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Fashion Originators' Guild of America v. FTC*, 312 U.S. 457 (1941).

The insurance industry has long recognized that neither the relevant activities of domestic reinsurers nor of foreign reinsurers are regulated by state law and conse-

quently are not immune under the McCarran-Ferguson Act. Because "an exempt authority forfeits antitrust exemptions by acting in concert with non-exempt parties," *Royal Drug*, 440 U.S. at 231, the insurers lost their immunity by enlisting the aid of the unregulated foreign reinsurers in their conspiracy.

This basic antitrust doctrine applies with particular force to the McCarran-Ferguson exemption because that Act creates a scheme of complementary regulation under state and federal law under which immunity from federal law exists only where there is state regulation. States cannot and do not regulate the domestic and foreign reinsurers' conduct at issue in this case. *See FTC v. Travelers Health Ass'n*, 362 U.S. 293, 298-99 (1960); *State Bd. of Ins. v. Todd Shipyards Corp.*, 370 U.S. 451, 456 (1962); J. Atwood & K. Brewster, *Antitrust and American Business Abroad* 78 (2d ed. 1981). Were petitioners' arguments accepted, there would be an unacceptable gap in which activities of the insurance industry would escape both federal and state regulation. Before the present case, both primary insurers and reinsurers urged these principles in seeking to maintain a market for reinsurance unfettered by state regulation. Both fully recognized the consequent absence of the McCarran-Ferguson immunity.

In the present case, state regulators were unable to reach the reinsurance boycott. They were restricted to accepting or to rejecting the policies with limited coverage offered by primary insurers as a result of the boycott without the ability to remedy the boycott itself. Absent the boycott, the state regulators would have had a variety of alternative coverages submitted to them for approval by the primary insurers that were ultimately coerced into joining the conspiracy. Moreover, the boycott by reinsurers effectively precluded recalcitrant primary insurers from offering the boycotted coverage even when approved by state regulators.

Royal Drug Co., 440 U.S. at 231, held that where an otherwise immune entity that was engaged in the busi-

ness of insurance conspired with an entity that was not engaged in the business of insurance, the otherwise immune entity lost its immunity. Otherwise McCarran-Ferguson Act immunity would have extended to non-immune entities, violating the principle that immunities are to be construed narrowly rather than broadly. *See id.* Here, likewise, petitioners seek to extend the immunity, in this case, to entities and conduct not regulated by state law. The logic and holding of *Royal Drug* apply with equal if not greater force.

In the global insurance and reinsurance market, United States federal courts must assert jurisdiction over conduce that involves a conspiracy among American and foreign defendants whose purpose and effect, as the plaintiffs allege, is to disrupt the American insurance market. When Congress has selected the regulation it finds appropriate for American markets, United States courts must exercise their jurisdiction in efforts to enforce Congress's policies. The decision of the Ninth Circuit should be affirmed. The London defendants' contrary argument that the avoidance of conflict with other nations' laws should be the primary consideration in a comity analysis is without support in case law, scholarly commentary, or policy.

ARGUMENT

I. AN AGREEMENT AMONG CERTAIN PRIMARY INSURERS AND CERTAIN REINSURERS TO WITHHOLD REINSURANCE FROM OTHER PRIMARY INSURERS THAT REFUSED TO ADOPT MORE LIMITED TERMS OF COVERAGE CONSTITUTES "BOYCOTT, COERCION, OR INTIMIDATION" UNDER THE McCARRAN-FERGUSON ACT.

A. The Boycott, Coercion, and Intimidation Restrained Competition.

The issue of boycott, coercion, and intimidation falls in a setting in these cases where competition in issuance of primary insurance was restrained. As of 1984, at which time defendants' concerted actions began, there were two kinds of CGL insurance coverage approved by

state insurance commissions throughout the United States: occurrence coverage and claims-made coverage. Although claims-made coverage may have been satisfactory for some policyholders, it failed to meet the needs of other policyholders. For example, with the elimination of occurrence coverage, a manufacturer or other business entity that ceased operations would be unprotected from any legal liability arising out of its prior conduct unless it continued to purchase claims-made insurance after it ceased operations and at the time the claim was made.

Before defendants began their coercive conduct, there were primary insurers who desired to compete in the CGL market by offering occurrence coverage. Because of the differences in the coverage offered, those primary insurers who desired to offer only claims-made coverage faced competition from the sellers of occurrence coverage.[17] The defendants' coercive conduct restrained competition from the sellers of occurrence policies.[18]

B. A Conspiracy to Refuse to Offer Reinsurance to Primary Insurers Unless They Agree to Limit Primary Insurance Coverage Constitutes Boycott, Coercion, or Intimidation Under the Antitrust Laws and Therefore under the McCarran-Ferguson Act.

The district court concluded that because the ultimate agreement reached among ISO members involved terms and conditions of coverage, that agreement was the type accorded antitrust immunity under the McCarran-Ferguson Act. The district court apparently found it irrelevant whether that ultimate agreement to limit the

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[17] We are using the "occurrence vs. claims made" dichotomy as an example here, but the same consequences apply to the other coverage limitations relating to "pollution" and "defense costs."

[18] It should be noted that not one state has approved providing for claims-made CGL coverage as the only approved coverage. Rather, those states that have approved claims-made coverage have also approved the occurrence coverage. Thus, no state has sanctioned the claims-made coverage as the only coverage available. Conversely, New York has approved only occurrence coverage while disapproving the claims-made coverage.

terms and conditions of coverage to policyholders was achieved voluntarily or was achieved involuntarily due to a concerted refusal to offer reinsurance to uncooperative primary insurers. The cases relied upon by the district court to support this proposition, however, all involve voluntary agreements in the insurance industry. *See, supra*, n.13.

The court of appeals concluded differently, holding that the coercion exerted by the defendants through a concerted refusal to deal was the very conduct which the McCarran-Ferguson Act intended to keep within the ambit of antitrust scrutiny. The history of that Act and this Court's decision in *Barry*, 438 U.S. 531 (1978), clearly support the conclusion of the court of appeals.

As this Court recognized in *Barry*, "[t]he McCarran-Ferguson Act was passed in reaction to this Court's decision in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944)." *Barry*, 438 U.S. at 538 (parallel citations omitted). The indictment in *South-Eastern Underwriters Ass'n* ("*S.E.U.A.*") alleged, *inter alia*, "boycotts together with other types of coercion and intimidation to force non-[S.E.U.A.] member insurance companies into the conspiracies . . . ." *S.E.A.U.*, 322 U.S. at 535. The "boycott and other types of coercion" included the non-members being "cut off from the opportunity to reinsure their risks . . . ." *Id.* One aspect of the conspiracy in which the non-members were forced to join was "fixing and maintaining arbitrary and noncompetitive premium rates on fire and specified 'allied lines' of insurance . . . ." *Id.* at 534. Thus, the Court in *S.E.A.U.* found that the use of coercion to reach involuntary agreement among insurers to fix the rates of insurance constituted a boycott.[19]

[19] In *S.E.U.A.*, the Court found that the defendants' conduct violated the antitrust laws:

> The kind of interference with the free play of competitive forces with which the appellees are charged is exactly the type of conduct which the Sherman Act has outlawed for American "trade or commerce" among the states.

S.E.U.A., 322 U.S. at 536.

Nothing in the legislative history of the McCarran-Ferguson Act indicates that the use of boycott, coercion, or intimidation to compel insurers to agree to rates, terms, or conditions of coverage is protected from antitrust scrutiny. *Barry* indicates the contrary:

> The language of § 3(b) is broad and unqualified; it covers "any" act or agreement amounting to a "boycott, coercion, or intimidation." Congress had intended to limit its scope to boycotts of competing insurance companies or agents, and to preclude all Sherman Act protection for policyholders, it is not unreasonable to assume that it would have made this explicit. While the legislative history does not point unambiguously to the answer, it provides no substantial support for limiting language that Congress itself chose not to limit.

Barry, 438 U.S. at 550 (footnote omitted). Indeed, petitioners failed to cite any legislative history[20] suggesting that an involuntary agreement relating to rates or terms of coverage which results from a "boycott, coercion, or intimidation" is protected from antitrust scrutiny regardless of its subject matter.[21]

[20] In fact, seven of petitioners' nine references to Congressional debates are from the debates regarding the Walters-Hancock Bill of 1943, a predecessor of the McCarran-Ferguson Act that totally exempted the insurance industry from antitrust scrutiny, which died in 1944 after a procedural vote in the Senate, with the close of the 78th Congress. *See* Brief for Petitioners in No. 91-1111 at viii-ix. The McCarran-Ferguson Act was subsequently introduced in the 79th Congress. *See generally* C.D. Weller, *The McCarran-Ferguson Act's Antitrust Exemption for Insurance: Language, History and Policy*, [1978] Duke L.J. 587.

[21] In enacting the McCarran Act, "Congress did not intend to and did not overrule the *South-Eastern Underwriters* case." *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 220 (1979). The dissent in *Barry* expressly recognized that the boycott provision encompassed "the kinds of antitrust violations alleged in *South-Eastern Underwriters*—that is, attempts by members of the insurance business to force other members to follow the industry's private rules and practices." *Barry*, 438 U.S. at 565 (Stewart, J., dissenting).

The exemption afforded insurance companies under the McCarran-Ferguson Act was aimed at protecting "cooperative" efforts, such as rate-making. In *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205 (1979), this Court, after reviewing the legislative history, concluded:

> Because of the widespread view that it is very difficult to underwrite risks in an informed and responsible way without intra-industry *cooperation*, the primary concern of both representatives of the insurance industry and the Congress was that *cooperative* rate-making efforts be exempt from the antitrust laws.

Royal Drug, 440 U.S. at 221 (emphasis added); *see also id.* at 222-24. "Cooperative" means "marked by a *willingness* and ability to work with others in a common effort." *Webster's Third New International Dictionary of the English Language Unabridged* 501 (Philip B. Gove ed., 4th ed. 1976) (emphasis added).

It flies in the face of the legislative intent, semantics, and logic to conclude that an ultimate agreement reached involuntarily through refusals to deal is protected by the McCarran-Ferguson Act in light of the legislative intent to protect certain cooperative efforts and in light of the "boycott, coercion, or intimidation" provision of section 3(b).

It would be ironic were the conduct of defendants in this case not to constitute boycott, coercion, or intimidation in light of the holding in *Barry*. *Barry* concerned a voluntary agreement among four companies by which three of the companies "refused to deal on any terms with the policyholders of the fourth as a means of compelling them to submit to new ground rules set by the fourth." [22] *Barry*, 438 U.S. at 533. The result in this case is the same as the result in *Barry*: a limitation of the terms of coverage. The same goal was achieved by

[22] As in this case, the objective of defendants' conduct in *Barry* was to eliminate occurrence coverage and offer only claims-made coverage.

the same means. Here, the refusal to deal was directed towards uncooperative insurers; in *Barry*, the refusal was directed at policyholders.

It is equally ironic that the defense (petitioners) in *Barry* argued that facts identical to those in this case fell within the boycott exception, whereas the facts in *Barry* did not.[23] The petitioners in *Barry* argued the significance of *S.E.U.A.* as follows:

> This Court distinguished between the agreements among the conspirators to fix the terms on which insurance would be sold and the coercive measures adopted by the conspirators to force other insurance companies and agents into the conspiracy or out of the business. It was only this latter category of activity to which the words boycott, coercion and intimidation were applied.

Brief for Petitioners at 25, *Barry*, *supra* (No. 77-240). The *Barry* petitioners argued the significance of the legislative history as follows:

> The legislative debates show that in enacting the boycott exception Congress was concerned with blacklists and similar punitive measures used by members of an industry to compel other traders to conform their competitive practices to those dictated by the conspiracy or to be excluded from competition. This was conduct characterized as a boycott in *South-Eastern Underwriters* and other boycott cases that have been decided by this Court under the Sherman Act.

Id. at 29.

C. Defendants' Conduct is a Boycott, Coercion, or Intimidation as Defined in *St. Paul Fire and Marine Insurance Co. v. Barry*.

Defendants' alleged conduct in the present case falls squarely within the concept of boycott set forth in *Barry*:

[23] There is some identity among petitioners in *Barry* and petitioners in the case *sub judice*. The Aetna Casualty & Surety Company and Hartford Insurance Company were petitioners in both cases.

> The enlistment of third parties in an agreement not to trade, as a means of compelling capitulation by the boycotted group, long has been viewed as conduct supporting a finding of unlawful boycott.

Barry, 438 U.S. at 544-45 (citations omitted). In *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985), this Court defined a boycott under the *per se* rule as:

> [J]oint efforts by a firm or firms to disadvantage competitors by "either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle."

Id. at 294 (quoting L.A. Sullivan, *Handbook on the Law of Antitrust* 261-62 (1976)). In present case, the primary insurer defendants, unable to achieve voluntary agreement on limiting the terms of CGL coverage with the other primary insurers, joined with reinsurers to deprive other primary insurers of the reinsurance they needed to offer competing forms of coverage, such as occurrence coverage, that the primary insurer defendants wanted to eliminate. As a result, those other primary insurers involuntarily capitulated. In *Barry*, the Court cited to Bird, *Sherman Act Limitations on Non-Commercial Refusals to Deal*, [1970] Duke L.J. 247, 263:

> As one commentator has noted: "If an individual competitor lacks the bargaining power to get a particular contract term, the courts apparently will not let him join with other competitors and use their collective bargaining power to compel the insertion of such a term into the contract, no matter how desirable." *Bird, supra*, n.11, at 263, discussing *inter alia, Binderup v. Pathe Exchange; Paramount Famous Corp. v. United States*, 282 U.S. 30, 51 S.Ct. 42, 75 L.Ed. 145 (1930)

Barry, 438 U.S. at 545 n.17.

Senator O'Mahoney, one of three Senators on the Conference Committee that drafted the boycott exception, defined coercive conduct the same way, anticipating a case such as the one *sub judice*:

> Therefore, any attempt by a small group of insurance companies to enter into an agreement by which they would penalize any person or any business which was attempting to do business in the insurance field in a way that was disapproved by them, would be absolutely prohibited by this provision [the boycott exception].

91 *Cong. Rec.* S1480 (1945).

D. Boycotts Violative of the Sherman Act Include Conditional, As Well As Absolute, Boycotts.

Lastly, petitioners urge, and the district court found, that a boycott under the McCarran-Ferguson Act must be an absolute boycott, a refusal to deal "on any terms." *See Insurance*, 723 F. Supp. at 476 (A-50). The district court relied upon the statement in *Barry* that:

> [*Barry*] induced its competitors to refuse to deal on any terms with its customers. *This agreement did not simply fix rates or terms of coverage*; it effectively barred St. Paul's policyholders from all access to alternative sources of coverage and even from negotiating for more favorable terms elsewhere in the market.

Id. (A-50) (emphasis added by district court).

The district court's interpretation appears to immunize conduct which otherwise would constitute a boycott, coercion, or intimidation. Under this interpretation, a group of insurers has absolute immunity to use any coercive methods available to compel another group of insurers to adopt, against their will, certain practices dictated by the first group. Is that the intent of the *Barry* decision? Even the dissent in *Barry* recognized that it was not, stating that "the legislative debates on [the McCarran-Ferguson] Bill, the Committee Reports, and the design of the statute itself" referred to "the kinds of antitrust violations alleged in *South-Eastern Underwriters*—that is, attempts by members of the insurance business to

force other members to follow the industry's private rules and practices." *Barry*, 438 U.S. at 565 (Stewart, J., dissenting).

The Ninth Circuit rejected the "on any terms" limitation. In reviewing that opinion, Professors Areeda and Hovenkamp agreed:

> The Ninth Circuit replied *correctly* that "boycott" "encompasses a conditional refusal to deal except on the terms demanded. The evil of a boycott is not its absolute character but the use of the economic power of a third party to force the boycott victim to agree to the boycott beneficiary's terms."

P. Areeda & H. Hovenkamp, *Antitrust Law*, § 210.2, at 124 (Supp. 1992) (quoting *Insurance*, 938 F.2d at 930) (emphasis added). Boycotts violative of the Sherman Act include conditional, as well as absolute, boycotts.[24] In *South-Eastern Underwriters, supra*, the boycott was conditional. The defendants jointly refused to deal (including issuing reinsurance) except on their terms. In *Fashion Originators' Guild of America v. FTC*, 312 U.S. 457, 461-62 (1941), the Guild members (garment manufacturers) conspired to boycott retailers who sold garments "copied by other manufacturers from designs put out by guild members." As a result of that pressure, more than six hundred (600) retailers involuntarily signed agreements not to buy garments from those other manufacturers. As a result, Guild members sold garments to those retailers. *See Fashion Originators'*, 312 U.S. at 461-62. In *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), certain manufacturers and distributors conspired "either not to sell to Klor's or to sell to it only at discriminatory prices and highly unfavorable terms." 359 U.S. at 209. In each of the above cases, the boycotts were not absolute. In each of the above cases, defendants would do business with the boycotted "target" if the "target" agreed to certain terms.

[24] The definition of "boycott" is the same under both the McCarran-Ferguson Act and the Sherman Act. *See Barry*, 438 U.S. at 549-50; *see also id.* at 556 (Stewart, J., dissenting).

Thus, in the case at bar, pursuant to an alleged conspiracy, certain reinsurers would not offer reinsurance to primary insurers that would not adopt the CGL coverage limitations which Hartford and the other primary insurer defendants demanded.

Since the agreement among the insurance companies in *Barry* was *voluntary*, the Court may have required a refusal to deal on any terms with the policyholders. But in the case *sub judice*, the agreement among the insurance companies is alleged to be involuntary. It is alleged that certain primary insurers enlisted the aid of reinsurers to coerce (through joint refusals to deal) unwilling insurers to exclude certain terms of coverage from their policies. Nothing is to be gained by requiring a refusal to deal to be absolute when it has the coercive effect its perpetrators intended it to have. In *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284 (1984), the boycott involved did not totally exclude the plaintiff from access to the defendants' wholesale operations. In positing whether a refusal to deal that allowed limited access by the plaintiff to defendant's wholesale operations constituted a boycott/refusal to deal, the Court reasoned:

> Such activity might justify *per se* invalidation if it placed a competing firm at a severe competitive disadvantage.

Northwest Wholesale, 472 U.S. at 295 n.6 (in dicta). This suggests that if the boycott has the effect of causing "a severe competitive disadvantage," it need not be a complete boycott and could still be a *per se* violation. In the case *sub judice*, in the very least, "severe competitive disadvantage" is alleged to have resulted from the conspiratorial refusal to deal involving reinsurance.

II. THE ACTIONS OF THE REINSURERS AS ALLEGED IN THE COMPLAINT ARE OUTSIDE RELEVANT STATE REGULATION AND THEIR ACTIONS ARE NOT SUBJECT TO McCARRAN-FERGUSON IMMUNITY.

A. The Reinsurers' Activities Alleged In The Complaint Are Not Regulated By State Law.

The Complaint alleges that the foreign reinsurers jointly refused to offer reinsurance for certain CGL coverages,[25] (Cal. Compl. ¶¶ 116-120, 131-140 (Claims 2, 5, & 6), J.A. 37-39, 43-46), and allege that these boycotts are actionable both in themselves, (Cal. Compl. ¶¶ 126-140 (Claims 4, 5, & 6), J.A. 41-46), and as part of a broader concert of action undertaken with domestic reinsurers, (Cal. Compl. ¶¶ 116-130, 146-150 (Claims, 2, 3, 4, & 8), J.A. 37-43, 47-49), as well as with certain primary insurers. *See id.*

The Complaint alleges that the states do not regulate reinsurance in the sense that confers McCarran-Ferguson Act immunity. The California Complaint alleges that "[u]nlike primary insurance companies, the business of reinsurance companies is not regulated by the states, with only certain limited exceptions concerning financial solvency." (Cal. Compl. ¶ 37, J.A. at 19.) Although these allegations must be taken as true at this juncture as a matter of law, there are supported by virtually all the leading authorities on reinsurance. *See, e.g.*, C.F. Aldrich, *Regulation, Accounting, and Statistics, in Reinsurance*, (R. W. Strain ed. 1980) 615, 621 ("[R]einsurance has been traditionally subject to little, if any, specific state regulations of the type contemplated by the McCarran-Ferguson Act"); B.L. Webb *et al.*, 2 *Principles of Reinsurance* 163-164 (1990); J.C. Gurley, *Regulation of Reinsurance in the United States*, 19 Forum 72, 76 (1983) ("[T]he states have enacted virtually no legislation which purports to regulate the terms and conditions of reinsurance transactions. . . . Curiously, few states have enacted laws designed to protect the financial solvency of reinsurers"); C.W. Havens & R.M. Theisen, *The Application of United States and EEC Antitrust Laws to Reinsurance and Insurance Pooling Arrangements*, 54 Antitrust L.J. 1299, 1304 (1986) ("[R]einsurance transactions have been excluded from most state insurance laws regulating the insurer-insured relationship"); B.C. Sullivan, *Reinsurance in the Age of Crisis*, 38 Fed'n of Ins. & Corp. Counsel Q. 3, 19 (1987) ("Traditionally, reinsurers, unlike primary insurers, have conducted their business free from the constraints of regulation").[26]

Indeed, a recent case note otherwise critical of Judge Noonan's decision, grudgingly concedes that, "[t]he

[25] Both the court of appeals and the district court held that respondents as consumers had standing to challenge the foreign reinsurers' boycott of reinsurance, *see Insurance*, 723 F. Supp. at 483; 938 F.2d at 926-27, as well as the conspiracy including the domestic insurers and reinsurers. This Court did not grant Petitioners' Writ for Certiorari on this issue.

[26] The authority cited by *Amici* National Association of Casualty & Surety Agents *et al.* (Brief for *Amici* National Ass'n of Cas. & Sur. Agents *et al.*, at p. 10) to support their assertions concerning the pervasiveness of the States' regulation of reinsurance demonstrate the contrary: that such regulation is exceptional. *Taggart v. Keim*, 103 F.2d 194 (3d Cir. 1939), and *Ballou v. Davis*, 75 F.2d 138 (7th Cir.), *cert. denied*, 295 U.S. 766 (1935), concern the authority of the states to regulate reinsurance contracts entered into by insolvent insurance companies, which the state is either operating or on the verge of operating. *See Taggart*, 103 F.2d at 196; *Ballou*, 75 F.2d at 139.

Amici cite *Coppage v. Resolute Ins. Co.*, 264 Md. 261, 285 A.2d 626 (1972), to demonstrate that states commonly regulate reinsurance relations to protect insurer solvency. The statute in *Coppage*, however, applied solely to reinsurance contracts in which the insurer ceded "the *entire* schedule of policies . . ." to the reinsurer. *Id.* at 270, 285 A.2d at 631-32 (emphasis added). Clearly, when an insurer reinsures all of its business, it effectively transfers its insuring function to another corporation and relies on the solvency of that company in order to pay claims. If such transactions were allowed without strict regulation, insurers could readily circumvent the state's solvency regulations. However, even such solvency regulation of reinsurers is rare. *See* Gurley, *Regulation of Reinsurance in the United States*, *supra*, at 76.

Court may have inadvertently reached the correct result because most states do not regulate reinsurance." Note, 105 Harv. L. Rev. 1414, 1417 n.42 (1992). In fact, there is no regulation at all of foreign insurers with no domestic domiciliary—neither of rates and forms nor of solvency. *See* Webb *et al.*, 2 *Principles of Reinsurance*, *supra*, at 164. Thus, there is no regulation of any of the defendant foreign reinsurers in any of the relevant states. (*See* States' Regulatory Appendix ¶ E, J.A. at 225-250).

1. *The Ninth Circuit Followed the Position Long Accepted by the Insurance Industry in Holding That Foreign Reinsurers Were Not Subject to McCarran-Ferguson Immunity.*

Adhering to the basic principle that "an exempt entity forfeits antitrust exemption by acting in concert with nonexempt parties," *Royal Drug Co.*, 440 U.S. at 231, the Ninth Circuit held that petitioners lost their McCarran-Ferguson Act immunity by conspiring with foreign entities that lacked immunity because they were not subject to state regulation. *See Insurance*, 938 F.2d at 928 (A-19). Following *FTC v. Travelers Health Ass'n*, 362 U.S. 293, 298-99 (1960), barring extraterritorial state regulation of insurance within the United States, the Ninth Circuit held that, *a fortiori*, McCarran-Ferguson Act immunity did not extend to foreign reinsurers, which, as a matter of law, could not be regulated by the states. *See Insurance*, 938 F.2d at 928 (A-20). Rather than "an unprecedented ruling with devastating impact on the insurance industry," (Brief for Petitioners in No. 91-1111 at 15), the decision followed accepted interpretation of *Travelers Health* and adopted the precise position accepted by the reinsurance industry since at least 1975 in both professional publications and public speeches, *i.e.*, that the absence of state regulation left both domestic and foreign reinsurers subject to the antitrust laws.

Regarding the foreign reinsurers, the Ninth Circuit followed the leading treatise on antitrust regulation of foreign business:

> The implications of this reasoning for foreign commerce would appear clear: since state insurance schemes do not, and could not, purport to regulate the bulk of international insurance transactions, the federal antitrust laws are fully applicable. This may be one area where the international nature of the transaction enhances antitrust risks.

J. Atwood & K. Brewster, *Antitrust and American Business Abroad* 78 (2d ed. 1981) (footnote omitted) (cited in *Insurance*, 938 F.2d at 928 (A-20)).

Atwood and Brewster's conclusions had been anticipated even earlier by the president of the RAA, who in 1975 had gone further, explaining in *Forum*, a publication of the American Bar Association, that American insurers themselves could not rely upon McCarran-Ferguson Act immunity in dealing with foreign entities. *See* C.W. Havens, *Extraterritorial Effect of the Antitrust Laws on Insurers—Some Observations and Questions*, 11 Forum 30, 37 (1975). Havens had cautioned that, "if an activity of an American insurer, whether it involves section 1 or 2 of the Sherman Act or section 7 of the Clayton Act, affects the 'foreign commerce' of the United States, then that insurer must be concerned about application of those federal statutes and cannot rely upon a McCarran-Ferguson antitrust exemption . . . ." *Id.*

2. *Rather Than Upsetting The Status Quo, the Ninth Circuit Reaffirmed The Basis For The Present Insurance Market Under Which Reinsurance Has Been Left Unfettered By State Regulation.*

Even the *domestic* reinsurers had long recognized that the trade-off for operating unfettered by state regulation what that they lacked the McCarran-Ferguson Act immunity that extended to primary insurers. N. David Thompson, president and chief executive officer of defendant North American Re, expressed this view:

> Reinsurers have generally conducted their operations free from the type of regulation to which primary insurers are subject in most jurisdictions. Reinsurance

rates are not approved or filed. Reinsurance treaty provisions are not governed by statute or regulation, except for special matters such as the nearly universal insolvency clause. . . . Thus, reinsurers have been outside the protections of the McCarran-Ferguson Act and so, at least, since the decision in the *South Eastern Underwriters* case, they are fully exposed to the enforcement of the antitrust laws, state as well as federal. (Footnote omitted.)

N.D. Thompson, *Critical Issues of the Eighties: How Trends in Reinsurance Will Affect Legal, Legislative, and Regulatory Actions*, 16 Forum 1038, 1055 (1981).

C.F. Aldrich, the president of Kemper Reinsurance, took the same view in a leading text on reinsurance:

> In addition, reinsurance has been traditionally subject to little, if any, specific state regulations of the type contemplated by the McCarran[-Ferguson] Act. As a result, reinsurance activities are more subject to antitrust exposures arising from a failure of the McCarran shelter than the majority of insurance industry activities.

C.F. Aldrich, *Regulation, Accounting, and Statistics in* R. W. Strain, *Reinsurance* 615, 621 (1980).[27] *Accord* J.C. Gurley, *Regulation of Reinsurance in the United States*, 9 Forum, 72, 91 ("Reinsurance companies and pools which conduct their affairs as though the McCarran-

[27] The article includes a biography describing Mr. Aldrich's extensive background in the industry:

> For over tweny years he has been in the insurance business [as] a member or chairman of many association committees dealing with such areas as reinsurance, marine insurance, group health insurance, rate regulations, and legal matters. He is a trustee of the U.S. Council of the International Chamber of Commerce. He also is chairman of the Industry Advisory Committee to the Subcommittee on Reinsurance, Syndicates, and Pools of the National Association of Insurance Commissioners.
>
> From the formation of Kemper Reinsurance Company, he has served as its chief operating officer and currently is its president and chief executive officer.

Aldrich, *supra*, at 641-42.

Ferguson Act exempts them from antitrust scrutiny leave themselves open to attack").

Echoing the view of the industry itself, the January, 1977 Report of the U.S. Department of Justice to the Task Group on Antitrust Immunities stated, "[i]nsofar as reinsurance rates are not regulated by the states, reinsurers are presently subject to federal antitrust restraints." *The Pricing and Marketing of Insurance: A Report of the U.S. Department of Justice to the Task Group on Antitrust Immunities* 266 n.477 (1977).

The absence of state regulation of reinsurers is the result of jurisdictional bars to adequate regulation,[28] practical difficulties arising from the extensive foreign involvement,[29] the perception that reinsurance included sophisticated professionals for whom state regulation was unnecessary,[30] and the belief that state regulation would impede the marketplace for reinsurance.[31] In short, it is a scheme that until now the insurance industry has wanted, accepted, and actively advocated.[32]

[28] *See, e.g.*, B.L. Webb *et al.*, 2 *Principles of Reinsurance* at 164 (1990); Gurley, *supra*, at 76.

[29] *See, e.g.*, Webb *et al.*, *supra* at 163-64. Havens and Theisen, citing Insurance Information Institute, *Reinsurance: Fundamentals and Current Issues* 57 (1983), report that "[a]pproximately twenty-five percent of reinsurance premiums in the United States are paid to alien, nonadmitted reinsurers." C.W. Havens & R.M. Theisen, *Application of United States and EEC Antitrust Laws to Reinsurance and Insurance Pooling Arrangements*, 54 Antitrust L.J. 1299, 1301 & 1301 n.5 (1986).

[30] *See, e.g.*, Havens and Theisen, *supra*, at 1303; N. David Thompson, *Critical Issues of the Eighties: How Trends in Reinsurance Will Affect Legal, Legislative, and Regulatory Actions*, 16 Forum 1038, 1043; Gurley, at 76.

[31] Havens & Theisen, *supra*, at 1303-04.

[32] *See* B.C. Sullivan, *Reinsurance in the Age of Crisis*, 38 Fed'n of Ins. & Corp. Counsel Q. 3, 19 (1987) ("[T]he potential for positive long-term effects from reinsurance regulation is open to question"); S. Tarnoff, State Regulators Call For Increased Reinsurance Data, *Business Insurance*, at 30 (Nov. 2, 1981) ("Reinsurance is

Rather than upsetting an extant scheme, the Ninth Circuit recognized that the marketplace, as it existed, lacked significant state regulation and preserved that situation by reemphasizing the limitations upon state regulation.

At least since *Morris & Co. v. Skandinavia Ins. Co.*, 279 U.S. 405 (1929), "the negotiation and execution outside the state, of a contract of reinsurance is not doing business in the state where the insured property is situated and the original risk was assumed. Reinsurance effected under a contract made in one state does not constitute doing business in another, although the risks covered by the reinsurance agreement were in the latter state . . . ." M.S. Rhodes, 2A *Couch Cyclopedia of Insurance Law*, § 21:54 at 380 (2d rev. ed. 1984 & Supp. 1992). *Morris* itself held that Mississippi lacked jurisdiction over a reinsurer which had entered into a reinsurance contract in New York of a risk located in Mississippi.

FTC v. Travelers Health Ass'n, 362 U.S. 293 (1960), recognized that this principle survived passage of the McCarran-Ferguson Act and limited a state's power to regulate in any way contracts of insurance or reinsurance outside its jurisdiction even though the risks covered were risks within the state. *See Travelers*, 362 U.S. at 300-01.

Two years later, *State Bd. of Ins. v. Todd Shipyards Corp.*, 370 U.S. 451, 456 (1962), reemphasized the particular limitations no state regulation of reinsurance, holding that Congress in passing the McCarran-Ferguson Act had "indicated without ambiguity that such state 'regulation or taxation' [of insurance] should be kept within the limits set by the Allgeyer, St. Louis Cotton Compress, and Connecticut General Life Insurance decisions." *See id.* (quoting 15 U.S.C. § 1012(a)).

Connecticut General Life Ins. Co. v. Johnson, 303 U.S. 77, 80-81 (1938), held that California lacked any au-

not an area where regulation is warranted or where it can be effective" (quoting J. Smith, insurance lawyer)).

thority to tax reinsurance premiums paid in Connecticut to an insurer authorized to do business in California by other insurers authorized to do business in California for risks located in California. *Allgeyer v. Louisiana*, 165 U.S. 578, 590-91 (1897), forbade a state from punishing a resident for entering into an out-of-state insurance contract and announced that the state could never regulate an insured's out-of-state contracting. In *St. Louis Cotton Compress Co. v. Arkansas*, 260 U.S. 346, 348-49 (1922), Justice Holmes, writing for a unanimous Court, held that Arkansas could not even tax the insurance premiums paid by a company lawfully doing business in Arkansas to a Missouri insurer under a contract entered into in Missouri but covering property located in Arkansas. Although the constitutional bases of these holdings have eroded, *Todd Shipyards* rejected any suggestion that the evolving standards of due process changed the results because, "[w]hen therefore, Congress has posited a regime of state regulation on the continuing validity of specific prior decisions, we should be loath to change them." *See Todd*, 370 U.S. at 457 (citation omitted); *see also Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 880 n.8 (1985) ("[T]he legislative history of The McCarran-Ferguson Act reveals . . . that Congress did not intend thereby to give the states any power to tax or regulate the insurance industry other than what they had previously possessed").

As a result, the reinsurance industry has operated outside the jurisdictional reach of state regulators, who generally have forborne attempts to regulate reinsurers. As a basic example, reinsurers are generally not required to be licensed in states other than their domicile.[33] The NAIC 1968 Unauthorized Insurers Model Statute provide that the "lawful transaction of reinsurance" is exempted from the requirement that a certificate of authority be obtained.[34] Thus, alien reinsurers are not licensed in any state. As a leading treatise explains:

[33] *See* Webb *et al.*, 2 *Principles of Reinsurance*, *supra*, at 163.

[34] *See* J.C. Gurley, *Regulation of Reinsurance in the United States*, 19 Forum 72, 76-77 (1983).

> Alien reinsurers are not subject to individual state reporting laws. Their financial reports frequently represent different time intervals, state values in different currencies, and present results in different formats. . . .
>
> *Rates and Forms.* Reinsurance forms and rates are not required to be filed for approval. The reinsurance business, being intrastate, interstate, and international, and necessarily limited to unique situations of the primary companies reinsured or the individual risks reinsured, does not lend itself to strict regulation of forms and rates. This lack of regulation of rates and forms creates problems in analyzing the financial solvency of reinsurers, since it is more difficult to know of all of the obligations and pricing of the reinsurer under its tailor-made reinsurance contracts.

B.L. Webb *et al.*, 2 *Principles of Reinsurance* 164 (1990).

The international character of reinsurance also has led to state regulatory forbearance because, "[b]urdensome state laws would inhibit reinsurers' ability to deal in international markets and to spread further the risks they have assumed." C.W. Havens & R.M. Theisen, *Application of United States and EEC Antitrust Laws to Reinsurance and Insurance Pooling Arrangements*, 54 Antitrust L.J. 1299, 1302 (1986).

Thus, because of legal constraints and because of the arguments of primary insurers and reinsurers that their dealings were best left unregulated by the states, a scheme evolved under which there has been no state regulation of the transactions, entities or conduct. Until the present case, the insurance industry acknowledged that the absence of state regulation placed reinsurance outside the McCarran-Ferguson exemption and that in dealing with reinsurers, they were subject to federal antitrust regulation. Rather than upsetting this scheme, the Ninth Circuit maintained the status quo.

B. By Failing To Observe The Terms Of Their Immunity, All Defendants Forfeited Their McCarran-Ferguson Act Exemption For The Conduct Undertaken Pursuant To The Conspiracy.

By conspiring with the unregulated and non-immune reinsurers, whether domestic or foreign, the domestic primary insurers and reinsurers lost their immunity for those activities undertaken in concert with the foreign reinsurers. "An exempt entity forfeits antitrust exemption by acting in concert with nonexempt parties." *Royal Drug Co.*, 440 U.S. at 231. *Accord National Broiler Marketing Ass'n v. United States*, 436 U.S. 816, 825 (1978) (Capper-Volstead immunity); *Ramsey v. United Mine Workers*, 401 U.S. 302, 313 (1971); *Case-Swayne Co. v. Sunkist Growers Inc.*, 389 U.S. 384, 393 (1968); *United Mine Workers v. Pennington*, 381 U.S. 657, 665-66 (1965).

Because the purpose of the McCarran-Ferguson Act "is not to exempt the insurance industry as such from the antitrust laws," *Group Life & Health*, 440 U.S. at 232 n.40, but rather to create a complementary scheme of regulation providing for federal regulation in those areas unregulated by the states, the rationale of the forfeiture doctrine applies with particular force in this case. *See also* 91 *Cong. Rec.* 475 (1945) (J.A. 217); 91 *Cong. Rec.* 1480 (1945) (J.A. 221-22); 13 *Public Papers & Addresses of Franklin D. Roosevelt: 1944-45* 587 (Rosenman ed. 1950) (J.A. 224). The foreign reinsurers are beyond the reach of the states' regulatory authority, and the only means for an aggrieved party to reach the conspiracy is under federal law.[35] As a leading article explains in the context of the reinsurance industry:

> It is usually said that the business of insurance enjoys an exemption from the federal antitrust laws under the McCarran-Ferguson Act. It is more accurate to say that the federal antitrust laws apply to the busi-

[35] Even assuming, *arguendo*, that the industry and states were wrong in their perception of the scope of state regulation, reinsurance has been unregulated as a result of their perception.

ness of insurance *except* to the extent that the business is regulated by state law. This latter perspective is significant in considering the application of the antitrust laws to reinsurance and insurance pooling arrangements. Because of the nature of reinsurance and the special functions served by reinsurance and insurance pools (including their role in international commerce), many reinsurance practices are not regulated by the states in the same manner as direct insurance. Where there is a gap in regulation, jurisdiction presumably lies under the federal antitrust laws.

C.W. Havens & R.M. Theisen, *Application of United States and EEC Antitrust Laws to Reinsurance and Insurance Pooling Agreements*, 54 Antitrust L.J. 1299 (1985) (footnotes omitted) (emphasis in original).

Petitioners seek to evade this basic principle by arguing that the McCarran-Ferguson Act is distinguishable from other antitrust exemptions because it immunizes "the business of insurance," rather than particular entities. Petitioners argue that so long as an *aspect* of the business (here the submission of final forms to state regulators by the insurers) is subject to state regulation, even the unregulated activities of foreign reinsurers in their negotiations of reinsurance with the primary insurers are immunized. The only way, however, that state regulators could reach the reinsurers' activities is by ineffective attempts to coerce the conduct of reinsurers through regulation of primary carriers. These attempts would likely be found to transgress the limitations upon state regulation found in *Travelers Health*, *Todd Shipyards*, *Connecticut General*, *St. Louis Cotton* and *Allgeyer*.

In this case, mere submission of coverage proposals for approval does not provide states with regulatory authority to remedy the reinsurers' boycott of various types of insurance, such as occurrence forms and pollution coverage. Without the reinsurers' aid in coercing the recalcitrant primary insurers to capitulate through a concerted refusal to reinsure, the primary insurers would have been unable to force ISO to limit the coverage proposals presented for state review and to limit the coverage eventually offered by other primary insurers. State regulators would have had a variety of coverage proposals before them for approval, including the original 1984 standards. Because state regulators lacked authority to reach the foreign reinsurers' boycott, they could not effectively remedy the conduct through the "indirect regulation" of the approval process. *Cf. Travelers Health Ass'n*, 362 U.S. at 298 n.4 (in a similar context, "there still would not be regulation by state law within the meaning of the § 2(b) proviso because the [state] statutes could not be effectively enforced against" the offending parties). They were restricted to approving or disapproving the limited forms submitted to them as a result of the conspiracy.

Petitioners' argument that there was not forfeiture because, as a practical matter, the ultimate forms were submitted to regulatory review, is similar to that rejected in *Case-Swayne Co. v. Sunkist Growers, Inc.*, 389 U.S. 384, 395 (1967), that the inclusion of non-immune entities was of "no economic significance," since the defendants could have undertaken the same conduct with the same economic effect without participation of the non-exempt entities. The argument carries even less weight here, where there is a fundamental "economic significance"—restriction of coverage.

Petitioners reduce the Ninth Circuit's decision to the absurd by arguing that a necessary consequence of their dealings with any non-immune entity (necessarily a part of their business) would strip them of all their immunity. Similarly, they erroneously argue that the holding will preclude necessary contacts with consumer and other advocacy groups. Petitioners are wrong in arguing that their contracts with reinsurers would necessarily strip them of *all* immunity. Immunity is lost because the otherwise immune party becomes jointly and severally liable for the acts of the non-immune co-conspirator. *See Beltz Travel Serv., Inc. v. International Air Transp. Ass'n*, 620 F.2d 1360, 1367 (9th Cir. 1980). The otherwise immune entity does not lose all immunity for its other activities, but only for those activities taken pur-

suant to its conspiracy with the non-immune entities that violate the antitrust laws. *See International Raw Materials, Ltd. v. Stauffer Chem. Co.*, —— F.2d ——, ——, 1992-2 Trade Cas. (CCH) ¶ 70,016, at p. 68, 990-91 (3d Cir. Oct. 30, 1992); *see also Case-Swayne Co. v. Sunkist Growers, Inc.*, 389 U.S. at 400-01 (1968) (White, J., concurring in the result) ("An exempt organization may not conspire with an outsider to violate § 1, but if it does, it does not forfeit its immunity except for that transaction").[36] Similarly, an immune entity would not lose its immunity for legal contacts with advocacy groups. Only where, as here, the non-immune entity was engaged in illegal activity would immunity be lost as a result of the *concerted* action with the non-immune entity.

Royal Drug held that where an entity otherwise immune under the McCarran-Ferguson Act because it was engaged in the business of insurance conspired with an entity that was not engaged in the business of insurance, the otherwise immune entity lost its immunity. To have held otherwise would have extended McCarran-Ferguson immunity to activities by persons outside the bounds demarcated by the Act.

Here, entities otherwise immune under the McCarran-Ferguson Act because certain of their activities are regulated by state law—a second specific requirement of the Act—seek to extend McCarran-Ferguson immunity to activities not regulated by state law and to entities not even within the regulatory jurisdiction of the states. The situation is analytically indistinguishable from *Royal Drug*; however, the policy reasons for limiting immunity are greater here, because to extend the immunity here would violate the fundamental scheme of the Act, which

[36] In dismissing this argument in a footnote, the district court fell into identical error, itself relying on a footnote in *Klamath-Lake Pharmaceutical Ass'n v. Klamath Medical Serv. Bureau*, 701 F.2d 1276, 1288 n.12 (9th Cir. 1983), which assumed that, by associating in any way with a non-immune entity, an insurer "would forfeit all of its exemption from the antitrust laws," a result the court found absurd.

is to regulate the market by providing immunity only where activities are regulated by state law and to reaffirm the application of the antitrust laws where, as here, such state regulation is absent.

III. THE NINTH CIRCUIT PROPERLY DETERMINED THAT THE UNITED STATES DISTRICT COURT HAS SUBJECT MATTER JURISDICTION OVER THE CLAIMS ASSERTED AGAINST THE LONDON DEFENDANTS.

The London defendants challenge the Ninth Circuit's ruling that an American federal court has and should exercise subject matter jurisdiction under the Sherman Act over certain claims in the California Complaint (Cal. Compl. ¶¶ 131-40 (Claims 5, 6 and 8), J.A. 43-49) and in the Connecticut Complaint (Conn. Compl. ¶¶ 125-39 (Claims 3, 4 and 5), J.A. 92-97)[37] ("London Reinsurance claims"). Although the London defendants challenge jurisdiction over these claims because they are the only claims asserted solely against these London-based defendants, many of the London defendants are named in other claims. (Cal. Compl. ¶¶ 116-30, 141-45 (Claims 2, 3, 4, and 7), J.A. 37-43, 46-47.)

A. The London Defendants Mischaracterized The Allegations Supporting The "London Reinsurance Claims."

The London defendants distort the allegations in the Complaint. They mischaracterize the conduct detailed in the London Reinsurance claims as the actions of foreign reinsurers in a foreign market endeavoring through long-standing practices to reduce their exposure to certain risks. This is not what the Complaint alleges.

The Fifth Claim alleges that the London defendants associated with Lloyd's of London ("Lloyd's defendants")

[37] Because claims in the two Complaints are analogous and because the California Complaint has been used as the standard complaint in this Brief, all references henceforth shall be to the California Complaint, unless the differences in allegations should be material.

boycotted all North American risk for occurrence coverage ("Occurrence Boycott"). Cal. Compl. ¶¶ 131-35, J.A. 43-44; Conn. Compl. ¶¶ 125-29, J.A. 92-94.) The Complaint describes how the Lloyd's defendants' Occurrence Boycott continued their prior agreements with American defendants to eliminate occurrence coverage from the American insurance market and to coerce the American primary insurers into accepting only claims-made coverage. (Cal. Compl. ¶¶ 86-88, J.A. 30-31.) Hence, the Complaint alleges that the Lloyd's defendants were continuing their joint effort with the American insurers and reinsurers to drive an insurance product out of the American insurance market.

The Sixth Claim alleges that the Lloyd's and other defendants associated with the London Company boycotted all American CGL risk written on a policy that failed to exclude pollution coverage ("Pollution Liability Boycott"). Cal. Compl. ¶¶ 136-40, J.A. 45-46.) The Complaint delineates the history of the Pollution Liability Boycott, (Cal. Compl. ¶¶ 93-96, J.A. 31-32), and alleges that the Pollution Liability Boycott was part of a "continuing agreement, understanding and concert of action," not just to limit the London defendants' exposure to pollution risks, but "to limit the availability of pollution coverage in U.S. primary casualty insurance." (Cal. Compl. ¶ 138, J.A. 45.)

The Eighth Claim alleges that the London defendants boycotted all North American property risks written on a policy without a pollution exclusion (the "Pollution Property Boycott"). (Cal. Compl. ¶¶ 146-50, J.A. 47-49.) The Complaint incorporates into this claim further description of the Pollution Property Boycott. (Calif. Compl. ¶¶ 106-10, J.A. 34-35.) In fact, the Complaint alleges that the defendants agreed, in writing, "to use their best endeavors to ensure that all U.S.A. and Canadian exposed insurance/reinsurance" would contain a pollution exclusion, that this was a continuing agreement to limit the availability of property insurance and pollution coverage in the United States, and that this agreement

grew to include numerous American reinsurers. (Cal. Compl. ¶¶ 108, 109, 148, J.A. 35, 48.)

Taking all the allegations of the Complaint in their entirety as true, the conduct underlying the three boycott claims was but one fragment of an overall agreement among all defendants to restrain the availability of primary insurance coverage for long tail and pollution risks *in the United States.*[38]

B. The Teachings Of This Court Support The Assertion Of Subject Matter Jurisdiction Over These Claims.

"[C]ourts of the United States have the power and ordinarily the obligation, to decide cases and controversies properly presented to them." *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400, 409 (1990). Under the Sherman Act, this Court has never held that a federal court lacked subject matter jurisdiction, or should not exercise that jurisdiction, over foreign actors whose foreign conduct was intended to and in fact caused substantial effects on American markets, as alleged herein. Rather, this Court has repeatedly affirmed that conduct is within American courts' jurisdictional reach under the Sherman Act simply if it involves foreign actors or occurs abroad. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704 (1962) ("A conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries"); *Steele v. Bulova Watch Co.*, 344 U.S. 280, 288 (1952) (There is no "blanket immunity or trade practices which radiate unlawful con-

[38] The Connecticut Complaint specifically alleges this in its First Claim. (Conn. Compl. ¶¶ 115-19, J.A. 88-90.) Allegations in the earlier-filed California Complaint command a reasonable inference that the actions of these three claims were carried out in furtherance of this agreement. The Connecticut claim was dismissed by the district court. The Ninth Circuit affirmed the dismissal but granted leave to amend on remand stating the "plaintiffs' basic theory is maintainable." *See Insurance*, 938 F.2d at 931 (A-26-27).

sequences here, merely because they were initiated or consummated outside the territorial limits of the United States"); *Thomsen v. Cayser*, 243 U.S. 66, 88 (1917) (Agreement formed abroad by foreign entities held within the reach of the Sherman Act because agreement "affected the foreign commerce of this country and was put into operation here"); *United States v. Pacific & A. Ry. & Nav. Co.*, 228 U.S. 87, 105-06 (1913) (American antitrust laws apply to agreement to control transportation in the United States even though agreement included foreign actors exercising control over foreign transportation routes); *see also United States v. Aluminum Co. of Am.*, 148 F.2d 416, 442 (2d Cir. 1945) ("*Alcoa*")[39] (Although the Sherman Act does not cover every foreign agreement causing effects in the United States, "a state may impose liabilities, even upon persons not within its allegiance for conduct outside its borders that has consequences which the state reprehends"). Given the lengthy history of this Court's decisions concerning the reach of the Sherman Act and the settled expectations these have no doubt generated, there is no reason for this Court to apply the Jones Act or Title VII determinations, as petitioners suggest.

Never has this Court suggested that the defendants' "principles of international comity" should bear on the assertion of jurisdiction over foreign actors whose actions in foreign countries are intended to cause and do cause major disruptions in American markets. In ruling on the propriety of international comity in *Kirkpatrick*, this Court held that such rationales should not be used for the "purposes of expanding judicial incapacities . . . ." *Kirkpatrick*, 493 U.S. at 408.

Repeatedly, this Court has held that under the Sherman Act, American courts should assert jurisdiction over foreign conduct, in foreign countries, which has anything

[39] The Second Circuit heard this case as a court of last resort. This Court cited *Alcoa* with approval in *Continental Ore Co. v. Union Carbide*, 370 U.S. at 704.

more than an incidental effect on American markets. Plaintiffs' allegations state that the foreign defendants' overseas conduct aimed to restrict the availability of insurance products to Americans and that, within the United States, many of these foreign defendants also conspired and joined with the American defendants, for the same illicit purpose, in other unlawful conduct.

C. The Decisions Of The Ninth Circuit And The Other Courts Of Appeals Support The Exercise Of Subject Matter Jurisdiction Over These Claims.

Lower courts have identified several factors to be weighed in determining when American law should be applied extraterritorially. *See Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597 (9th Cir. 1976); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979); *Restatement Foreign Relations Law* (3d) § 403 (1987). Defendants' assertion that "the most critical of these factors is conflict with the law or policy of another nation," (Brief for Petitioners in No. 91-1128 at 7 (hereinafter "Brief")) departs sharply from even the most deferential approaches to foreign law taken by the lower courts.[40]

Timberlane, which the Ninth Circuit properly applied below, is the most favorable rule for the defendants.[41]

[40] In *Mannington*, 595 F.2d at 1298 (3d Cir. 1979), the Third Circuit discussed extraterritorial jurisdiction under the Sherman Act and found "substantial agreement" with *Timberlane*, identifying ten factors to be considered in determining whether jurisdiction should be exercised. These factors are nearly coextensive with those in *Timberlane*. London defendants note that *Mannington*'s ninth factor, whether a ruling would be acceptable in our country if by a foreign nation, is not noted in *Timberlane*. London defendants argue that interference with American regulation of American markets by a British court would be poorly received here. Plaintiffs seek, and the Ninth Circuit envisioned, no interference with British regulation of the British reinsurance market. If the *Mannington* factors were to apply, the result would be the same.

[41] The London defendants themselves regard the *Timberlane* test as "the most enlightened application of principles of international

Although the *Timberlane* test has not been uniformly accepted, these courts' alternative tests give potential conflict with foreign laws even less weight than does *Timberlane*.[42] Under any of these standards, a district court could and should assert jurisdiction over the London defendants. To adopt a test giving overwhelming import to the potential conflicts with foreign laws would be to depart radically from settled law.

1. *The Ninth Circuit Gave Proper Weight To The Test Contained In The Foreign Trade Antitrust Improvement Act.*

The Ninth Circuit reasoned that the Foreign Trade Antitrust Improvement Act ("FTAIA")[43] requires a court

law to questions of jurisdiction under U.S. economic regulations." Petition For A Writ of Certiorari of Merrett Underwriting Agency Management Limited, *et al.*, at 3.

[42] *See Laker Airways v. Sabena*, 731 F.2d 909 (D.C. Cir. 1984); *National Bank v. Interbank Card Ass'n*, 666 F.2d 6 (2d Cir. 1981). The D.C. Circuit rejected interest balancing because it requires the politically-charged weighing of national interests. *Laker*, 731 F.2d at 948-51. Unlike *Insurance*, *Laker* involved an actual, direct conflict with British law. *Laker* analyzed arguments, similar to the London defendants', that American courts should defer to Britain's hostility to American antitrust laws by withholding jurisdiction. *Laker* recognized that this hostility shows a lack of comity on the part of British officials, stating "certainly our law has not departed so far from common sense that it is reversible error for a court not to capitulate to a foreign judgment based on a statute like the British Protection of Trading Interests Act, designed to prevent the court from resolving legitimate claims placed before it." *Id.* at 939. Rather, "from the earliest times, authorities have recognized that the obligation of comity expires when the strong public policies of the forum are vitiated by the foreign act." *Id.*

The Second Circuit rejected *Timberlane* to build on the "fundamental effects test outlined by Judge Learned Hand" in *Alcoa*, and inquired primarily whether the "restraint has, or is intended to have, any anticompetitive effect on United States commerce." *National Bank v. Interbank Card Ass'n*, 666 F.2d 6 (2d Cir. 1981). The Seventh Circuit declined to apply *Timberlane* and rejected the argument that *Timberlane* vitiates *Alcoa's* effects test. *In re Uranium Antitrust Litig.*, 617 F.2d 1248, 1254 (7th Cir. 1980).

[43] 15 U.S.C. § 6a (The Sherman Act "shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless . . . such conduct has a direct, substantial, and reasonable foreseeable effect . . . on trade or commerce which is not trade or commerce with foreign nations").

to determine whether the relevant conduct has a direct, substantial, and reasonably foreseeable effect on American commerce,[44] and, if so, to decline jurisdiction under *Timberlane* only in unusual cases. *See Insurance*, 938 F.2d at 932 (A-28). London defendants disagree. The Ninth Circuit, however, essentially agreed with the defendants' present assertion that the FTAIA leaves comity considerations unaffected. The court acknowledged that "*as the legislation does not eliminate comity*, a court should look to see if the case before it is one in which comity still has a role to play." *Id.* (A-28) (emphasis added). The court then conducted a thorough analysis of the comity issue in a careful consideration of the *Timberlane* factors.[45] This analysis was not unaffected by the district court's findings under the FTAIA or the FTAIA itself.

2. *The Ninth Circuit Gave Significant And Sufficient Weight To The Potential For Conflict With British Laws And Policy.*

Conflict is but one of several relevant factors. The Ninth Circuit considered five others: the parties' nationality, the efficacy of enforcement, the significance of effects in each country, the intent to harm American interests, and the foreseeability of American effects. *See Insurance*, 938 F.2d at 932-34 (A-29-31). The Ninth Circuit found that all of these factors favored American

[44] The district court concluded that the FTAIA did not shield these defendants from antitrust liability on these claims because the plaintiffs had alleged a direct, substantial, and reasonably foreseeable effect on American markets.

[45] London defendants note that the Ninth Circuit failed to consider the seventh *Timberlane* factor, the relative importance of conduct within the United States and conduct abroad to the violations charged. Consideration of this factor would not have changed the result. Even the district court found that, although these claims were based on foreign agreements, activities in the United States were significant.

jurisdiction and thus held that the district court's jurisdiction "must be exercised." *Id.* at 934 (A-31). London defendants argue that Judge Noonan was wrong because he did not hold that the potential for conflict with foreign laws outweighed all other factors.

In support of their contentions, defendants now proffer a detailed history of self-regulation and governmental regulation of the British reinsurance industry. All of this, however, is irrelevant because the Ninth Circuit concurred, in this regard, with the London defendants and the British Government, stating that the "district court found that *application* of the antitrust laws to the London reinsurance market 'would lead to significant conflict with English law and policy.' The British brief reiterates that conclusion; we do not doubt its accuracy." *Id.* at 933 (A-29) (quoting the court below) (citation omitted) (emphasis added).

In fact, no genuine conflict exists between United States and British law in this case. The London defendants make no suggestion that British law requires them to violate American law, that British law forbids what American law requires, or that compliance with American antitrust law would interfere with the conduct of their business in London or within the European Economic Community. They point to no inconsistency between American antitrust law and the United Kingdom's Competition Act of 1980 or Article 85(1) of the Treaty of Rome governing competitive practices in the EEC. The supposed conflict is in reality nothing more than a dispute about the propriety of subjecting British subjects to the jurisdiction of American courts.

The defendants remain unsatisfied because they would like the avoidance of conflict between American and British laws to be given even more weight. Nothing supports their position either in lower court decisions or in the voluminous scholarship regarding the comity issue. The London defendants have cited none. In today's global markets, such a radical departure from established law would eviscerate Congress's ability to regulate Amer-

ican markets. A nebulous concern that conflict with other nations' laws ought to be avoided cannot support such a legislative change in the reach of American law.

3. *The Ninth Circuit Properly Concluded That Other Timberlane Factors Outweigh Any Conflict With British Laws In This Case.*

Several other *Timberlane* factors favor the exercise of American jurisdiction. So held the Ninth Circuit. The London defendants disagree. The Ninth Circuit correctly decided that the nationalities of the parties favored American adjudication. All the plaintiffs in this case are either American citizens or American States. All the defendant foreign corporations do extensive business in American markets, and some are subsidiaries of American corporations. The London defendants instead make the completely unsupported assertion that "the comity issue should focus on the nationality of the parties against whom relief is sought." (Brief at 28.) Not even *Timberlane* reached this conclusion.

Applying *Timberlane*'s third factor (the extent to which enforcement by either state can be expected to achieve compliance), the Ninth Circuit found that effective relief in this case could be obtained through orders directed to American insurers (several of whom are parents of the foreign entities) and without reliance on the cooperation of British courts to enforce American court orders. Although no relief has yet been fashioned, the London defendants object to the Ninth Circuit's finding, speciously claiming that they will and must evade enforcement of American court decrees.

Of the *Timberlane* factors, three concern the effects of foreign conduct on the United States: the relative significance of effects on the United States as compared to those elsewhere; the extent to which there is explicit purpose to harm American commerce; and the foreseeability of such effect. *See Timberlane*, 549 F.2d at 614. All of these factors favor the assertion of jurisdiction. London defendants' conduct had its effect in the American primary insurance market, where certain forms of insur-

ance became either unavailable or prohibitively expensive. Plaintiffs have alleged that this was the London defendants' explicit purpose (even the defendants concede that this effect was foreseeable).

When three out of the seven *Timberlane* factors weigh heavily in favor of exerting jurisdiction, two weigh less heavily, and only one weighs against, a court should find that jurisdiction ought to be exercised. The London defendants are correct in describing the Ninth Circuit's decision as one "in which effects were determinative," (Brief at 29); but they are wrong in suggesting that it is "an incorrect decision." (*Id.*) The *Timberlane* and other tests mandate that domestic and foreign interests be *balanced*, not that potential conflicts with foreign laws be avoided at all costs. Adoption of the London defendants' position would result in state-sanctioned international cartelization. Even the European Community disagrees with their position. Recently, the Commissioner of the European Communities prohibited under European antitrust law an American cartel sanctioned by American law under the Webb-Pomerene Act from shipping soda ash into the members of the European Community, including Great Britain, under Article 85(1) of the EEC Treaty. *See*, Comm'n Decision of 19 December 1990, IV/33016—*Ansac*, 34 Official J. of the Euro. Communities, L 152, at 54 (15 June 1991).

D. Global Economic Integration Supports The Assertion Of Subject Matter Jurisdiction Over These Claims.

American markets operate within an increasingly integrated global economy. The interdependence of national economies makes it imperative for American courts to exercise jurisdiction over foreign actors in foreign countries when their actions threaten important domestic economic policies. Comity should be reserved for those situations in which the legitimate substantive laws of each nation impose conflicting obligations. The London defendants could readily obey the laws of both the United

States and of Britain by competing for American business.

In April, a British scholar noted that the "growing economic interdependence of nations, the scale of foreign operations of many companies, the emergence of global securities markets, the great rise in cross-border banking and the scope for rapid foreign transfer of assets or documents all mean that some extraterritorial reach of domestic law is essential if it is to remain effective." P.M. Roth, *Reasonable Extraterritoriality: Correcting the "Balance of Interests,"* 41 Int'l & Comp. L.Q. 245, 266-67 (1992). Moreover, he continued, "[c]onfronted with transactions and arrangements that are planned internationally, an attempt to control them by a regulatory framework that is rigidly confined within national boundaries is increasingly unrealistic. Indeed, *if the prescriptions of regulatory legislation cannot extend beyond territorial frontiers, cartelists would be encouraged to seek antitrust havens* from which to conduct their operations." *Id.* (emphasis added).

American courts must enforce Congress's economic regulations. Courts cannot abandon the important public policies underlying economic regulation, such as the Sherman Act, out of a nebulous concern that conflict with foreign law ought to be avoided. Comity would function as "a wall protecting private transactions from public regulations." J.R. Paul, *Comity In International Law*, 32 Harv. Int'l L.J. 1, 70 (1991). American courts must assert jurisdiction over all those who conspire illegally, in foreign nations, to violate American law and who intend or cause substantial effects on American domestic markets. Otherwise, the Sherman Act will be rendered ineffective. The decision of the Ninth Circuit should be affirmed.

CONCLUSION

The respondents respectfully request this Court to affirm the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on June 18, 1991.

Respectfully submitted,

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